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12-10-07

No. 07-259

In the Supreme Court of the United States

VLADIMIR IOURI AND VERA YURIY, PETITIONERS

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals permissibly construed petitioners' motions filed with that court—which sought only a stay of their removal from the United States and made no reference to a stay of the period during which they could voluntarily depart the United States—not to encompass a request for a stay of the voluntary departure period.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-22a) is reported at 487 F.3d 76. An earlier opinion of the court of appeals (Pet. App. 23a-41a) is reported at 464 F.3d 172. The orders of the Board of Immigration Appeals (App., *infra*, 1a-2a, 3a-4a, 5a-6a, 7a-8a), and the decision of the immigration judge (App., *infra*, 9a-24a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 2007. The petition for a writ of certiorari was filed on August 22, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA or the Act), 8 U.S.C. 1101 *et seq.*, as amended in 1996, provides that "[t]he Attorney General may permit" certain removable aliens "voluntarily to depart the United States at the alien's own expense." 8 U.S.C. 1229c(a)(1) and (b)(1).[1] Voluntary departure may be granted before the initiation of removal proceedings or during the course of such proceedings, 8 U.S.C. 1229c(a)(1), and also may be granted at the close of removal proceedings in lieu of an order that the alien be removed from the United States, 8 U.S.C. 1229c(b)(1). Aliens who receive voluntary departure avoid the five- to ten-year period of inadmissibility that would result from an order of removal. See 8 U.S.C. 1182(a)(9)(A). Voluntary departure also permits aliens "to choose their own destination points, to put their affairs in order without fear of being taken into custody at any time, [and] to avoid the stigma * * * associated with forced removals." *Thapa* v. *Gonzales*, 460 F.3d 323, 328 (2d Cir. 2006) (quoting *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004)).

To qualify for a grant of voluntary departure at the close of removal proceedings, an alien must satisfy certain statutory conditions, including establishing that he "has the means to depart the United States and intends to do so." 8 U.S.C. 1229c(b)(1)(D); see 8 U.S.C.

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[1] Because petitioners' deportation proceedings were commenced prior to the April 1, 1997, effective date of the relevant provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, the grant of voluntary departure to petitioners in this case is governed by Section 244(e)(1) of the INA (which was codified at 8 U.S.C. 1254(e)(1) (1994)). See IIRIRA § 309(c)(1), 110 Stat. 3009-625 (effective date provisions); *INS* v. *St. Cyr*, 533 U.S. 289, 317-318 (2001).

1229c(b)(1)(A)-(C). Because the Act provides that the Attorney General "may" permit an alien to depart voluntarily, see 8 U.S.C. 1229c(a)(1) and (b)(1); 8 U.S.C. 1254(e)(1) (1994), the determination whether to allow an alien to do so is discretionary with the Attorney General, and with the immigration judge (IJ) and Board of Immigration Appeals (BIA or Board) who act on his behalf. The INA, as amended by IIRIRA, provides that "[n]o court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure." 8 U.S.C. 1229c(f). It also bars a court from "order[ing] a stay of an alien's removal pending consideration of any claim with respect to voluntary departure." *Ibid.*

The Act, again as amended by IIRIRA, prescribes that, when an alien is granted voluntary departure at the conclusion of removal proceedings, "[p]ermission to depart voluntarily * * * shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2). An IJ who grants voluntary departure must "also enter an alternate order [of] removal," which takes effect if the alien fails to depart within the period specified in the voluntary departure order. 8 C.F.R. 1240.26(d); see 8 C.F.R. 1241.1(f). After entry of a final order, authority to extend a period of voluntary departure specified initially by an IJ or the BIA is vested in the district director or other officers of Immigration and Customs Enforcement (ICE) in the Department of Homeland Security (DHS), subject to the statutory maximum, instituted in IIRIRA, of 60 days in the case of voluntary departure granted at the conclusion of removal proceedings. See 8 C.F.R. 1240.26(f).[2] Failure "to depart the United States within

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[2] At the time at issue in this case, the power to extend a period of voluntary departure was vested in the relevant district director of the

the time period specified" results, *inter alia*, in the alien's becoming "ineligible, for a period of 10 years," to receive certain forms of discretionary relief, including cancellation of removal, adjustment of status, and a subsequent grant of voluntary departure. 8 U.S.C. 1229c(d)(1)(B) (Supp V. 2005); see 8 C.F.R. 1240.26(a).[3]

2. a. Petitioners, a husband and wife, are citizens of Ukraine who entered the United States in 1993 as non-immigrant visitors for pleasure. Soon after their arrival, petitioners sought asylum, with petitioner Iouri claiming that he had been persecuted because of his membership in the Ukranian Orthodox Church and petitioner Yuriy claiming eligibility as a dependent.[4] Pet. App. 5a & n.1.

b. On November 22, 1996, the Immigration and Naturalization Service (INS) issued Orders to Show Cause and Notices of Hearing alleging that petitioners had overstayed their visas and were removable as a result.

Immigration and Naturalization Service. 8 C.F.R. 240.26(f) (2002).

[3] At the time at issue in this case, the INA provided that an alien who was granted voluntary departure and did not depart within the time allotted, "other than because of exceptional circumstances," was barred from receiving certain enumerated forms of relief, including adjustment of status, for a period of five years. 8 U.S.C.1252b(e)(2)(A) (1994); see 8 U.S.C. 1252b(e)(5) (1994). That provision was repealed by Section 308(b)(6) of IIRIRA, 110 Stat. 3009-615, and redesignated as amended as 8 U.S.C. 1229c(d) (Supp. V 2005), by IIRIRA § 304(a)(3), 110 Stat. 3009-597. That provision was in turn amended and redesignated as 8 U.S.C. 1229c(d)(1) by Section 812 of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 3057. Because petitioners have never argued that their overstay of voluntary departure should have been excused based on "exceptional circumstances," the differences between these provisions are not directly at issue here.

[4] In the administrative record, petitioner Vera Yuriy is often referred to as "Vera Iouri."

Admin. R. 364-367; 388-394. A hearing was held before an IJ at which petitioners both testified. Pet. App. 6a. On December 8, 2000, the IJ issued an oral decision that made "a negative credibility finding" with respect to each petitioner, App., *infra*, 22a, and denied their applications for asylum and for withholding of removal pursuant to both federal immigration law and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85, Pet. App. 23a. The IJ granted petitioners' alternative requests for voluntary departure, ordering that they be permitted to depart "until February 6th, 2001, or any extension that may be granted by the Board of Immigration Appeals or the Immigration and Naturalization Service." *Ibid.* The IJ also ordered that if petitioners "fail to depart when and as required, the order granting voluntary departure shall be withdrawn without further notice or proceedings" and petitioners "shall be ordered deported from the United States to Ukraine on the charges contained in the Order to Show Cause." *Ibid.* In a separate written order, petitioners were informed of the statutory consequences of failing to depart within the time specified, including the fact that they would be ineligible for adjustment of status for a period of five years. *Id.* at 7a-8a; see note 3, *supra*.

Petitioners filed timely appeals of the IJ's decision with the BIA, Pet. App. 8a, which had the effect of rendering the IJ's order non-final and suspending the voluntary departure period pending appeal. See 8 U.S.C. 1101(a)(47)(B)(i) (order "become[s] final" upon affirmance by the BIA or the expiration of time for seeking BIA review); 8 U.S.C. 1229c(b)(1) (authorizing the At-

torney General to permit voluntary departure "at the conclusion of a [removal] proceeding under section 1229a"); *In re A-M-*, 23 I. & N. Dec. 737, 744 (B.I.A. 2005). On November 27, 2002, the BIA issued two orders summarily affirming the IJ's decision. App., *infra*, 5a-6a, 7a-8a. The Board ordered that petitioners would be permitted to depart the country voluntarily "within 30 days from the date of this order or any extension beyond that time as may be granted by the district director." *Id.* at 5a, 7a. It also warned that failure to do so would result in petitioners being removed as provided in the IJ's order and render them ineligible "for any further relief" for a specified number of years. *Id.* at 6a, 8a.[5]

c. On December 26, 2002, one day before the expiration of the voluntary departure periods established by the BIA's orders, petitioners filed motions to stay their removal with the United States Court of Appeals for the Second Circuit. On December 27, 2002, petitioners filed petitions for review of the BIA's decisions. In neither filing did petitioners ask the Second Circuit to stay their voluntary departure periods, Pet. 5; Pet. App. 8a, nor did they seek extensions of their voluntary departure periods from the appropriate district director, see 8 C.F.R. 240.26(f) (2002); 8 C.F.R. 1240.26(f) (2004). "Nor did they depart." Pet. App. 8a.[6] In January 2003,

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[5] The BIA's orders mistakenly stated that petitioners' ineligibility period would last ten years (the period specified by current law) rather than the five-year period that is applicable in this case. See notes 1, 3, *supra*.

[6] A review of the Second Circuit's docket reveals that the court of appeals never acted on petitioners' motions to stay their orders of removal. A September 5, 1995, memorandum issued by the Clerk of the Second Circuit with the concurrence of the United States Attorney for

still in the United States, petitioners filed motions with the BIA seeking to reopen their removal proceedings to permit them to apply for adjustment of their immigration status based on the INS's November 25, 2002, approval of an immediate relative petition filed on petitioners' behalf by their United States citizen daughter. Pet. App. 8a, 20a. On May 29, 2003, the BIA denied the motions to reopen, concluding that petitioners were statutorily ineligible for adjustment of status because they had overstayed their voluntary departure periods. *Id.* at 8a, 12a; App., *infra*, 1a-4a. Petitioners filed additional petitions for review with the Second Circuit challenging

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the Southern District of New York states that the government has agreed "not to deport or return aliens in any case where the Clerk's office has informed the U.S. Attorney that a stay motion has been filed, until and unless the motion for stay is denied." On January 26, 2007, the Director of the Department of Justice's Office of Immigration Litigation (OIL), which on May 15, 2006, assumed primary responsibility for the government's representation in immigration matters filed with the Second Circuit, wrote a letter to Chief Judge Jacobs stating that "OIL has adhered to the practices described in the September 5, 1995 memorandum since it began its transition to Second Circuit work last May" and that it would continue to do so absent further notice.

Neither the 1995 memorandum nor the 2006 letter states that the period during which an alien may depart voluntarily will automatically cease to run after a motion for a stay of removal is filed, or that the government undertakes to give a stay motion that effect. Neither, in fact, makes any reference to voluntary departure. The government did not argue below that the court of appeals' failure to enter a stay order in this case, or the nature of the memorandum and letter addressing departure after a stay motion has been filed in the Second Circuit, precluded a holding that petitioners' voluntary departure periods had been suspended. Those unusual features of stay practice in the Second Circuit would, however, detract from the suitability of this case for review by this Court, even if, contrary to our submission, the question presented otherwise warranted such review

the BIA's denials of their motions to reopen. Pet. 6; Pet. App. 8a.

3. A unanimous panel of the court of appeals denied the petitions for review in a published opinion. Pet. App. 1a-22a.[7] The court of appeals rejected petitioners' contention that the IJ had erred in denying their requests for asylum and withholding of removal, *id.* at 8a-11a, and noted that they "ha[d] not sought review" of the IJ's rejection of their claims under the Convention Against Torture, *id.* at 11a n.5.

The court of appeals then turned to petitioners' contention that the BIA had abused its discretion in denying their motions to reopen their removal proceedings. Pet. App. 12a. Concluding that petitioners' voluntary departure periods had started to run when the BIA affirmed the IJ's decision, *id.* at 12a-14a, it determined that petitioners were "barred from adjusting their status unless the period for voluntary departure was stayed, tolled, or otherwise extended by their having filed for a stay of [removal]" on December 26, 2002, *id.* at 14a.

Reiterating its earlier holding in *Thapa* v. *Gonzales*, 460 F.3d 323 (2d Cir. 2006), the court of appeals concluded that it "ha[d] the *authority* . . . to stay an agency order [of voluntary departure] pending . . . consideration of a petition for review on the merits." Pet. App. 15a (emphasis added; brackets in original)

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[7] The panel issued its original opinion (Pet. App. 23a-41a) on September 11, 2006. *Id.* at 23a. After petitioners sought rehearing, the panel issued an amended opinion (*id.* at 1a-22a) that, *inter alia*, addressed the fact that "[d]uring the course of this appeal, Congress repealed the IIRIRA transitional rules" that had barred judicial review of removal orders in situations where an alien had already been removed. *Id.* at 2a-3a.

(quoting *Thapa*, 460 F.3d at 324-325). The court acknowledged that other courts of appeals had "held that where an alien files a motion to stay removal before the period for voluntary departure expires, such a motion should be construed as including a motion to stay the voluntary departure period." *Ibid.* (citing *Desta* v. *Ashcroft*, 365 F.3d 741, 743 (9th Cir. 2004), and *Rife* v. *Ashcroft*, 374 F.3d 606, 616 (8th Cir. 2006)). But the court of appeals stated that it "disagree[d]" with these decisions and "join[ed] the First and Seventh Circuits" in deciding that "an alien who wishes to stay the period for voluntary departure must explicitly ask for such a stay." *Ibid.* (citing *Bocova* v. *Gonzales*, 412 F.3d 257, 268 (1st Cir. 2005), and *Alimi* v. *Ashcroft*, 391 F.3d 888, 892-893 (7th Cir. 2004)).

"The relief sought by a stay of [removal]," the court of appeals reasoned, "is different from that sought by a stay of voluntary departure." Pet. App. 17a. Whereas a stay of removal "prevent[s] the forced removal of an alien from the country," which "may end up returning an alien to the very persecution he or she was fleeing in the first place," "[v]oluntary departure * * * is a privilege granted an alien in lieu of [removal]" that "affords [the] alien certain benefits." *Id.* at 16a. When a court "stops the clock on the period within which an alien is required to depart," it "effectively extends the time during which an alien is allowed to leave voluntarily" and to reap the benefits of having done so. *Id.* at 17a. As a result, "the equities involved in the two types of stays may also differ," *id.* at 18a (citing *Rife*, 374 F.3d at 616), and "the Government deserves prompt notice of precisely what relief a petitioner seeks," *id.* at 18a n.8. Indeed, the court of appeals stated that providing such notice "is a petitioner's responsibility" under Federal Rule of Appel-

late Procedure 18(a)(2)(B)(i). Pet. App. 18a n.8. Here, it noted, petitioners not only "styled their motion as [seeking] a 'stay of deportation,'" their moving papers stated that, absent a stay, they were "subject to being *physically deported* from the United States." *Ibid.* (internal quotation marks and citation omitted). Because "the reasons offered by Petitioners for granting their stay were aimed at deportation rather than their period for voluntary departure," they "failed to give appropriate notice that they sought relief in the form of voluntary departure." *Ibid.*

Having decided that it would not construe petitioners' motions for a stay of deportation automatically to include a stay of the period for voluntary departure, Pet. App. 18a-19a, the court of appeals also declined to "adjudicate a stay of voluntary departure *nunc pro tunc*," *id.* at 19a. Although the court was "sympathetic to the position Petitioners find themselves in," it concluded that "this is not a case in which error on the part of the court or the INS put Petitioners in a worse position." *Id.* at 20a. Noting that petitioners' immediate relative petitions had already been approved at the time the BIA affirmed the IJ's decision and granted them an additional 30 days to depart the country, the court of appeals stated that petitioners "had several options * * * [that] might have preserved their privilege to depart voluntarily," including: (1) filing motions to adjust their status before the voluntary departure periods expired; (2) seeking an extension of their voluntary departure periods from the appropriate INS official; or (3) filing timely applications for stays of voluntary departure with the court of appeals. *Ibid.* The court also stated that this case was unlike *Desta* or *Rife*, because nothing in the Second Circuit's prior decisions could have "misled"

petitioners into believing "that they did not have to file a motion specifically seeking a stay of voluntary departure." *Id.* at 20a-21a.

Finally, the court of appeals observed that "Petitioners may not be without a remedy." Pet. App. 21a. "Under pre-IIRIRA regulatory authority," it noted, "the INS District Director (now the appropriate Field Office Director, U.S. Immigration Customs Enforcement, Department of Homeland Security) may grant a *nunc pro tunc* extension of voluntary departure." *Id.* at 21a-22a (citing 8 C.F.R. 1240.57). Citing petitioners' age, lack of criminal history, United States citizen daughter, and the fact that "any delay on Petitioners' part may be attributable to counsel's failure to recommend that they seek to extend their voluntary departure period before overstaying that period," the court of appeals expressed the view that "the INS District Director might well consider exercising his or her discretion to grant an extension so that Petitioners may adjust their status to lawful permanent residents." *Id.* at 22a.

ARGUMENT

Petitioners contend (Pet. 10-27) that the Second Circuit's decision that a motion for a stay of removal will not be deemed automatically to encompass a motion to stay voluntary departure is erroneous and conflicts with the decisions of other courts of appeals. Although the courts of appeals have taken different approaches to this issue of stay practice, this Court's review is not warranted. The question presented involves an exceedingly narrow issue of judicial procedure involving the proper interpretation of documents filed with the courts of appeals themselves, not a question of substantive immigration law. In addition, the Second Circuit's position is

reasonable and works no injustice to the particular petitioners in this case.

1. The question presented is a narrow one. All but one of the courts of appeals to have considered the question have held that they have the authority to stay a period of voluntary departure[8]—although those holdings are difficult to square with the strict statutory limitations now applicable to that substantive relief and the foreclosure of judicial review of issues concerning voluntary departure, see 8 U.S.C. 1229c(b)(2) ("Permission to depart voluntarily * * * shall not be valid for a period exceeding 60 days."); 8 U.S.C. 1229c(f) (providing that "[n]o court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure" and barring a court from "order[ing] a stay of an alien's removal pending consideration of any claim with respect to voluntary departure"). See Resp Br. at 5-8, 19-20, 35-36, *Dada* v. *Mukasey*, cert. granted, No. 06-1181 (to be argued Jan. 7, 2008).[9] At the same time, every court of

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[8] See *Bocova* v. *Gonzales*, 412 F.3d 257, 266 (1st Cir. 2005); *Thapa* v. *Gonzales*, 460 F.3d 323, 325 (2d Cir. 2006); *Obale* v. *Attorney Gen.*, 453 F.3d 151, 157 (3d Cir. 2006); *Vidal* v. *Gonzales*, 491 F.3d 250, 252 (5th Cir. 2007); *Nwakanma* v. *Ashcroft*, 352 F.3d 325, 327 (6th Cir. 2003); *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 654 (7th Cir. 2004); *Rife* v. *Ashcroft*, 374 F.3d 606, 615-616 (8th Cir. 2004); *El Himri* v. *Ashcroft*, 344 F.3d 1261, 1262 (9th Cir. 2003). In contrast, the Fourth Circuit has held that it lacks the power to stay a period of voluntary departure. *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 194 (2004). *Ngarurih*, however, involved an alien petitioner who asked the court of appeals to "reinstate" a period of voluntary departure that had already expired at the time the request was made. See *id.* at 187, 191. As explained below, no court of appeals has held that it may grant a stay of voluntary departure in such circumstances.

[9] As noted above, petitioners are subject to the pre-IIRIRA provisions governing voluntary departure. This feature of the case

appeals that has squarely confronted the question has held that it lacks the authority to stay or reinstate a voluntary departure period that has already expired at the time the initial request is made.[10] And even assuming that judicial stays of the voluntary departure period are sometimes permissible under the current statutory and regulatory scheme, this case does not involve the substantive standards a court should use in determining whether such a stay should be granted. See Pet. i.

Instead, the question presented by the petition for a writ of certiorari (Pet. i) is whether a court of appeals is *required* to construe *every* motion that seeks a stay of removal as "necessarily * * * includ[ing] a request to stay the running of [a] voluntary departure period," regardless of whether the motion itself seeks such relief. As petitioners note (Pet. 11-13), three courts of appeals have concluded that, given their "equitable power to construe motions broadly," circuit law regarding the substantive standards for granting stays of removal and stays of voluntary departure, and those courts' respective assessments of the likelihood that an alien who seeks one kind of judicial relief would also desire the other, it is most reasonable to "construe" all timely motions that seek a stay of removal"as including a timely motion to stay voluntary departure." *Desta*, 365 F.3d at

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further undermines its suitability for review by this Court, even if the particular issue concerning stay practice in the courts of appeals might otherwise warrant review by this Court at some point. See also note 6, *supra*.

[10] See *Bocova*, 412 F.3d at 266; *Reynoso-Lopez* v. *Ashcroft*, 369 F.3d 275, 280-281 (3d Cir. 2004); *Ngarurih*, 371 F.3d at 192-193; *Mullai* v. *Ascroft*, 385 F.3d 635, 639-640 (6th Cir. 2004); *Rife*, 374 F.3d at 616; *Sviridov* v. *Ashcroft*, 358 F.3d 722, 731 (10th Cir. 2004). The Ninth Circuit has reserved the question. *Desta*, 365 F.3d at 745-746.

748-749; see *Rife*, 374 F.3d at 616 (endorsing *Desta*'s analysis but "leav[ing] * * * for the future" whether "every alien who warrants a stay of removal also warrants a stay of voluntary departure"); *Macotaj* v. *Gonzales*, 424 F.3d 464, 466-467 & n.1 (6th Cir. 2005). In contrast, three courts of appeals have determined that for a variety of reasons, including the different consequences of a stay of removal and a stay of voluntary departure, the fact that the equities may differ with respect to each form of relief, and the interest in affording notice to both the government and the court of precisely what relief a petitioner is seeking, it is most appropriate to require aliens to specify if they are seeking a stay of a voluntary departure period. Pet. App. 15a-19a; *Bocova*, 412 F.3d at 268-269; *Alimi* v. *Ashcroft*, 391 F.3d 888, 891-893 (7th Cir. 2004).

These different approaches to stay practice in the courts of appeals do not warrant this Court's review. Petitioners assert (Pet. 8-9) that the circuits' differing approaches generate "intolerable inconsistency" and will result in aliens in some circuits being "expelled from the country" while otherwise identically situated aliens in other circuits will be permitted to remain. But any variation in local procedural rules or practices in the courts of appeals could have that incidental effect. This Court is not required (Pet. 17-18) to insist on uniformity in areas that involve not the substantive requirements for obtaining immigration relief, but rather the stay practices in individual circuits and the manner in which the courts may choose to construe documents filed with them. See *Thomas* v. *Arn*, 474 U.S. 140, 142 (1985) (holding that a court of appeals "may exercise its supervisory powers to establish a rule that the failure to file objections to [a] magistrate's report waives the right to

appeal the district court's judgment"); *id.* at 146 ("It cannot be doubted that the courts of appeals have supervisory powers that permit * * * the promulgation of procedural rules governing the management of litigation.").

Notwithstanding petitioners' contention to the contrary (Pet. 18-20), the proper resolution of the question presented is of little practical significance, and the number of cases affected by it is likely already diminishing significantly. Assuming that an alien is genuinely interested in obtaining both forms of relief, it is difficult to see any non-strategic reason why the alien would not expressly seek both a stay of removal and a stay of a voluntary departure period. Far from being "burdensome" (Pet. 14), the effort required to caption a filing as a Motion for Stay of Removal and Stay of Voluntary Departure rather than simply a Motion for Stay of Removal, and to make appropriate arguments with respect to each, is minor. And once a particular circuit has announced whether it will construe all motions for a stay of removal as also encompassing a request for a stay of the voluntary departure period, aliens filing petitions for review within that circuit are on full notice of what actions they must take to protect their rights.

2. There is an additional reason why review in not warranted in this case. On November 30, 2007, the Attorney General issued a proposed rule addressing a number of issues related to voluntary departure. 72 Fed. Reg. 67,674 (2007). The proposed rule would, *inter alia*, expressly provide that an alien's filing of a motion to reopen or reconsider with the Board "prior to the expiration of the voluntary departure period will have the effect of automatically terminating the grant of voluntary departure." *Ibid.* The filing of a petition for review

with a court would have the same effect. *Ibid.* As a result, an alien who previously had agreed to depart voluntarily within the time specified in the BIA's order, and thereby to forgo any further dispute over his continued presence in this country, would be given the opportunity to withdraw from that agreement, file a motion to reopen with the BIA or petition for review with a court in an effort to obtain the ability to remain, and avoid the penalties for overstaying his voluntary departure period if he chose to remain in the country until the BIA or the court ruled.

Because, under the proposed rule, the filing of a petition for review (and any related motion for a stay of removal) would terminate the permission for the alien to depart voluntarily, the question presented in this case—whether the filing of a motion to stay removal also should be deemed to include a request to stay the running of the voluntary departure period—would not arise. Of course, upon termination of the permission to depart voluntarily, the alien would then be subject to removal under the alternate order of removal in the BIA's order, as well as the attendant consequences of removal, unless the alien in fact obtained a stay of removal pending further review from the BIA or the court.

The proposed rule would "app[ly] prospectively only, that is, only with respect to immigration judge orders issued on or after the effective date of the final rule that grant a period of voluntary departure." 72 Fed. Reg. at 67,682. But the rule, if it becomes final, would further diminish the prospective significance of the issue in this case.

3. This Court's review is likewise unwarranted because the Second Circuit's decision is sound and reasonable and works no unfairness in this particular case.

Federal Rule of Appellate Procedure 18(a)(2)(B)(i) requires a party seeking a stay of agency action pending judicial review to identify "the reasons for granting the relief requested and the facts relied on." As the court of appeals explained (Pet. App. 16a-18a), a stay of removal is a substantively different form of relief than a stay of a voluntary departure period, and the equitable considerations regarding stays may play out differently with respect to each. "Voluntary departure confers substantial benefits compared with involuntary removal, and this difference provides an incentive to depart without dragging out the process and without requiring the agency and courts to devote resources to the matter." *Alimi*, 391 F.3d at 892. Accordingly, unlike when an alien seeks only a stay of removal, when an alien seeks a stay of a voluntary departure period, a court must consider "whether it is appropriate for [it] to obliterate any incentive to abandon the litigation." *Ibid.*

In addition, because the volume of immigration cases is enormous and because "stays usually require expedited judicial consideration," courts of appeals may reasonably see a "need for both the government and the court to understand exactly what relief the movant is seeking." *Bocova*, 412 F.3d at 268. Regardless of whether it is truly "inconceivable" (Pet. 23) that an alien who seeks a stay of removal would not also seek a stay of a voluntary departure period,[11] the same statistics

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[11] Although it is not the claim on which they seek review, petitioners err in suggesting (Pet. 25-26) that there is a constitutionally based right to effective assistance of counsel in removal proceedings that may warrant excusing an alien's failure to make a timely and procedurally proper request for a stay of voluntary departure. An alien in removal proceedings has a statutory right to be represented by counsel of the

petitioners cite demonstrate that IJs grant voluntary departure in only 10% of all removal cases.[12] As even

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alien's choice at no expense to the government. 8 U.S.C. 1229a(b)(4)(A). This Court has never held, however, that the United States Constitution requires the government to appoint counsel for aliens in removal proceedings. And in *Coleman* v. *Thompson*, 501 U.S. 722 (1991), the Court held that, when the Constitution does not require the government to provide counsel, the ineffectiveness of privately retained counsel is not attributable to the government and does not violate the Constitution. *Id.* at 754; see *Wainwright* v. *Torna*, 455 U.S. 586 (1982) (per curiam) (no basis for constitutional claim of ineffective assistance of counsel in seeking discretionary state supreme court review of criminal conviction, because there is no constitutional right to counsel in that setting).

There is no obvious reason why the result should be different in the removal context. As Judge Easterbrook has explained:

> The Constitution entitles aliens to due process of law, but this does not imply a right to good lawyering. Every litigant * * * is entitled to due process, but it has long been understood that lawyers' mistakes in civil litigation are imputed to their clients and do not justify upsetting the outcome. The civil remedy is damages for malpractice, not a re-run of the original litigation.

Magala v. *Gonzales*, 434 F.3d 523, 525-526 (7th Cir. 2005) (citations omitted). Indeed, this Court has repeatedly held in other contexts that a party is bound by counsel's errors in civil proceedings. See *Lawrence* v. *Florida*, 127 S. Ct. 1079, 1085 (2007); *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-397 (1993); *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990); *United States* v. *Boyle*, 469 U.S. 241, 249-250 (1985); *Link* v. *Wabash R.R.*, 370 U.S. 626, 633-634 (1962). Thus, although a number of courts of appeal, including the Second and Ninth Circuits (Pet. 25-26), have held that an alien has a constitutionally based claim of ineffective assistance of counsel in removal proceedings, this Court's decisions do not support that proposition.

[12] See Executive Office for Immigration Review, United States Dep't of Justice, *FY 2006 Statistical Yearbook* at Q1, table 14 (Feb. 2007)

courts that have taken a different approach than the Second Circuit in construing stay motions have acknowledged, the government's decision about whether to oppose a stay may depend in part on whether an alien seeks only a stay of removal or also seeks a stay of a voluntary departure period as well, *Desta*, 365 F.3d at 741, and a court's assessment about whether to grant a stay may at least sometimes vary depending on the form of relief the alien is seeking, *Rife*, 374 F.3d at 616.

Nor does the Second Circuit's decision in this case result in any unfairness to petitioners. As the court of appeals explained (Pet. App. 20a), "this is not a case in which error on the part of the court or the INS put [p]etitioners in a worse position."[13] In addition, petitioners "had several options"—including filing motions to adjust their status before their voluntary departure pe-

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<http://www. usdoj.gov /eoir/statspub/fy06syb.pdf>.

[13] Nor is *Foti* v. *INS*, 308 F.2d 779 (2d Cir. 1962) (en banc), rev'd, 375 U.S. 217 (1963) (Pet. 16), to the contrary. The question at issue in *Foti* was whether the Attorney General's discretionary decision to deny an application for suspension of deportation constituted a "final order of deportation," judicial review of which was authorized under former 8 U.S.C. 1105a. Responding to the contention that an affirmative answer was necessary to conform to Congress's intent "to create a single, separate statutory form of judicial review," Judge Friendly stated that even the dissenting opinion would recognize at least one departure from that ideal: "After an automatic stay and ultimate adverse decision by us, the deportee, unless he voluntarily departs, can have another although more limited fling in the district court, by *habeas corpus*, once he is taken into detention." *Foti*, 308 F.2d at 783-784. But "automatic stay[s]" of removal were abolished in 1996, see IIRIRA, § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. 1105a(a)(3) (1994)), and nothing in the statement in *Foti* reasonably could have led an alien to conclude that a motion for a stay of removal necessarily encompasses a motion for a stay of voluntary departure.

riods expired, seeking extensions of their voluntary departure periods from the appropriate INS official, or filing timely motions for stays of their voluntary departure periods with the court of appeals—that "might have preserved their privilege to depart voluntarily." *Ibid.*

Finally, the court of appeals noted (Pet. App. 21a) that, even at this late date, "Petitioners may not be without a remedy," because they could seek to have the appropriate DHS official "grant a *nunc pro tunc* extension of voluntary departure" under the pre-IIRIRA law that governs this case. Petitioners have made no representation to this Court that they followed up on that suggestion, and a review of their files with DHS does not reveal any document requesting extensions (nunc pro tunc or otherwise) of their voluntary departure periods. Further review by this Court is not warranted.

4. Petitioners have not asked this Court to hold the petition for a writ of certiorari pending its decision in *Dada* v. *Mukasey*, cert. granted, No. 06-1181 (to be argued Jan. 7, 2008), and there is no need to do so. As formulated by the Court, the question presented in *Dada* is: "Whether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure." Because petitioners filed their motions to reopen their removal proceedings after the permission for them to depart voluntarily had already expired, see pp. 6-7, *supra*, there was nothing left to toll. In addition, because motions to reopen removal proceedings are filed with entities that have the power to grant voluntary departure in the first place (an IJ or the BIA), whereas motions of the sort at issue in this case are filed with a court, even a holding in Dada's favor would not help petitioners here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys

DECEMBER 2007

APPENDIX A

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A73-033-322- NEW YORK Date: [May 29, 2003]

In re: IOURI, VLADIMIR

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Kogan, Irina, Esquire

ON BEHALF OF SERVICE:
Susan Egan, Assistant District Counsel

ORDER:

PER CURIAM. This case was last before us on November 27, 2002, when this Board dismissed the respondent's appeal from an Immigration Judge's decision. The respondent has now filed a motion to reopen. The motion will be denied.

Pursuant to section 240B(d) of the Act, 8 U.S.C. § 1229c(d), an alien who fails to depart following a grant of voluntary departure, and who has been provided writ-

ten notice of the consequences of remaining in the United States, is statutorily barred from applying for certain forms of discretionary relief. We find that the respondent is barred from applying for adjustment of status by section 240B(d) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(d). An alien who remains in the United States after the scheduled date of departure is statutorily ineligible for discretionary relief. Therefore, because the respondent has remained in the United States after the scheduled date of departure, the respondent is now statutorily ineligible for the relief sought. Accordingly, the motion to reopen is denied.

/s/ ILLEGIBLE
FOR THE BOARD

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A73-033-321- NEW YORK Date: [May 29, 2003]

In re: YURIY, VERA

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Kogan, Irina, Esquire

ON BEHALF OF SERVICE:
Susan Egan, Assistant District Counsel

ORDER:

PER CURIAM. This case was last before us on November 27, 2002, when this Board dismissed the respondent's appeal from an Immigration Judge's decision. The respondent has now filed a motion to reopen. The motion will be denied.

Pursuant to section 240B(d) of the Act, 8 U.S.C. § 1229c(d), an alien who fails to depart following a grant of voluntary departure, and who has been provided writ-

ten notice of the consequences of remaining in the United States, is statutorily barred from applying for certain forms of discretionary relief. We find that the respondent is barred from applying for adjustment of status by section 240B(d) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(d). An alien who remains in the United States after the scheduled date of departure is statutorily ineligible for discretionary relief. Therefore, because the respondent has remained in the United States after the scheduled date of departure, the respondent is now statutorily ineligible for the relief sought. Accordingly, the motion to reopen is denied.

/s/ ILLEGIBLE
FOR THE BOARD

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A73-033-322 - NEW YORK Date: [Nov. 27, 2002]

In re: IOURI, VLADIMIR

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Kozak, Felix

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and

Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ ILLEGIBLE
FOR THE BOARD

APPENDIX D

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A73-033-321 - NEW YORK Date: [Nov. 27, 2002]

In re: YURIY, VERA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Kozak, Felix

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and

Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ ILLEGIBLE
FOR THE BOARD

APPENDIX E

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
New York City, New York

File Nos.: A 73 033 322
A 73 033 321

IN THE MATTER OF
VLADIMIR IOURI, VERA IOURI, RESPONDENTS

IN REMOVAL PROCEEDINGS

July 6, 2000
[Filed: Dec. 8, 2000]

CHARGE: In each case, Section 241(a)(1)(B) - aliens who were in the United States beyond the authorized time without permission from Immigration Naturalization Service.

APPLICATIONS: Relief sought, Section 208, political asylum; Section 243(h), withholding of deportation to the Republic of the former Soviet Union. Withholding deportation as per Article 3, Convention Against

Torture and voluntary departure in the alternative.

ON BEHALF OF RESPONDENT:

Felix Kozak, Esquire

ON BEHALF OF SERVICE:

Virna Wright, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent's are respectably a 64-year-old male and 59-year-old female, natives of the former Soviet Union and citizens of Ukraine.

The male respondent entered as a visit for pleasure on April 4, 1993, authorized to remain in the United States until October 3, 1993.

The female respondent entered on August 3, 1993, authorized from then to February 2, 1994.

Application for political asylum was filed formally by the male respondent naming his wife. On August 27th, 1993, this application was considered after the reform of regulations of January 5, 1995; and when considered but not granted, it was referred to the Office of Immigration Judge by the issuance of the Order to Show Cause dated November 22, 1996, placing the respondents in deportation proceedings.

On July 17th, 1997, they were each found deportable as charged pursuant to Section 241(a)(1) of the Act, by evidence that was clear, convincing, and unequivocal.

The I-589 request for asylum, the attachment, and the addendums submitted in the context of these proceedings by their counsel, all serve as the applications for relief under Sections 208 and 243(h), and Article 3, Convention Against Torture.

There were also supporting documentation, which will be discussed in the context of this decision and it includes: a letter from the Russian Orthodox Church here in the United States; three certificates from the Ministry of Internal Affairs in the Ukraine in the area where they lived; A medical abstract from a hospital. These documents were not authenticated but were allowed into evidence, whatever weight they can be given. There were two birth certificates, one each for the respondents and their marriage certificate. Also, allowed into evidence, but given limited weight, was the INS assessment referral memo and notes.

The respondents testified, the male respondent, Vladimir testified first. He indicated that he's a member of the Ukrainian Orthodox Church. His daughter is in the United States as a lawful permanent resident and a review of her card indicates that she's been a permanent resident since 1998. She's been married to a U.S. citizen during that time so it appears that she would be eligible to apply for naturalization benefits within a year of this hearing.

Respondent says that after 1990, he did have problems because of his religion. Beginning in December of 1991 when he was walking home, three people followed him and beat him, causing him to be hospitalized for seven days.

It should be noted that this attack is not mentioned in his application or attachment, however, it is mentioned on Exhibit 2B as addendum to the application for political asylum. However, that addendum makes no mention of the need for seven days hospitalization after the attack. The respondent said his injuries included a scalp wound.

He says, from the remarks made to him by the attackers, he believes it was motivated because of his religion but could give very few other details regarding the motivation of the attackers. He did mention that there was a conflict between the Ukrainian and Russian Orthodox Church. But again, it is not clear that these attackers were anti-religion or members of the Russian faction who are against the Orthodox Ukrainian faction.

When asked how it is the attackers would have known that the respondent was active with the Ukrainian Orthodox Church, the respondent offered that he took part in periodic gatherings at his apartment. Implicit in that remark is that the attackers must have known about these gatherings. But again, it was not at all clear how it is they would have known what religion that he was associated with.

Respondent says that in March of 1992, attackers vandalized his house. He wasn't home at the time. Neighbors witnessed the act. There were crude words written on the wall regarding Ukrainian Orthodox, so the respondent believes that again this vandalization was motivated by religious purpose.

The most brutal attack took place in February 1993. The respondent explained he was home at the time, when three intruders came into the apartment, vandal-

ized the apartment and started brutally beating the respondent, causing severe injuries including a kidney injury and requiring hospitalization for approximately one month.

The respondent said that his wife contacted the police and a report was given but nothing else was done after the report was given.

The respondent said that when he was in the Ukraine, there were no Ukrainian Orthodox Churches open yet, although the background materials indicate that the Ukrainian Orthodox Church is now very large in the Ukraine.

The respondent says that in the United States, he does attend a church. He could not recall the name but does remember the pastor, Father Luplin, who is a Bulgarian. Other than that, he could not remember much about Exhibit 4 which actually was signed by another individual whose name the respondent did not originally recognize, and who indicates that he knew the respondent very well.

The stationary of Exhibit 4 is Russian Orthodox Church. The respondent was asked why he would attend a Russian Orthodox Church and he indicated that he would have to go somewhere. Although, based on his testimony, the information in the background materials, it is the Russian Orthodox with whom the Ukrainian Orthodox have a great deal of problems back in Ukraine.

On cross-examination, he was asked about the Ukrainian Orthodox being the largest denomination in Ukraine. The respondent acknowledge [*sic*] that that

may very well be the case now, but was not previous to the time that he was there.

He acknowledged that he was not exactly sure who assaulted him. He's not sure if he ever saw Exhibit 7 before. Exhibit 7 is the certificate from the Ministry of Internal Affairs referring to the last attack in 1993.

Just a parathetical note, that document indicates that in the translation that it was issued in April of 1994 but the interpreter advised us that the translation was in error and the document was issued in 1993. Again, I also note there was no mention of the hospitalization of the male respondent after this December 1991 attack.

The respondent Vera Iouri also testified and she was able to confirm that they did indeed attend the church listed in the letter at Exhibit 4. She was not able to shed too much additional light on why they would attend that church, in light of the situation in Ukraine; the conflict between the Orthodox Church loyal to the Moscow partriarch and the Orthodox Church loyal to the Kiev patriarch.

The respondent, Vera, did testify that her husband had problems throughout his life with regard to his religion after 1990.

She said that he was attacked on either February or December 1993. When it was indicated to her, she was able to acknowledge that he had actually left the country by April 1993, she indicated that the attack took place in February 1993.

She also indicated that he was hospitalized for one month after the February 1993 attack. Which is consistent with testimony given by the male respondent and

consistent with the addendum and evidence regarding the hospitalization.

However, she indicated that the hospitalization of February 1993, stemmed from an attack on him on the street, Carmen Street. That the respondent, Vera, was home at the time. That the respondent, Vladimir, staggered back to the apartment. He was so badly beaten and bleeding, but he did make it back to the apartment and the respondent, Vera, called for help.

Respondent was taken to the hospital. The respondent, Vera, indicated that the doctors had called the police in at that time, of course the respondent, Vladimir, had testified that his wife had notified the police to come and take a complaint.

It even was brought to her attention that the addendum and testimony of Vladimir, as well as Exhibit 7, all indicate that the attack on the respondent, Vladimir, took place in the apartment, not on Carmen Street.

Respondent, Vera, at first insisted that that attack on February of 1993 took place on the street. But then when it was brought to her attention that the document from the Ministry of Internal Affairs also made mention of the attack being made in the apartment, then the respondent changed her testimony and revealed there was an attack in December of 1992 and perhaps that was the one that took place on the street. Then the February 1993, indeed was an attack that took place in the apartment as the respondent Vladimir had stated.

Just to clarify that date, she was asked if December 1992, does she mean another attack took place several months before the February 1993 attack and she said

that there were. There were many attacks at or around that time.

But again, it should be noted that there is no evidence of a December 1992 attack. The male respondent did not testify to that effect. There's no mention of the December 1992 attack on the application for asylum or the addendum. The respondent acknowledged that she was confused and only knows that there was an attack back in 1993 and that her husband stayed in the hospital.

The Service has offered the assessment referral memo into evidence. It should be noted that except for the 1991 attack, there is no other information that specifically corroborates the respondent's claim as it's stated on his addendum and does not corroborate his claim that he told this exact story that's on his addendum to the asylum officer at the time of the interview.

However, I also note that I have some concerns between discrepancies in the notes of the assessment referral memo and the assessment referral memo. While I allowed it into evidence for when I weigh it, I intend to give Exhibits 12A and 12B very little weight in light of these discrepancies and the unavailability of the examiner to explain the discrepancies. While the document is in evidence, it will be given very little weight.

With regard to back material, we have the Department of State Country Reports and Human Rights Practices. A Profile from the Bureau of Democracy, Human Rights and Labor. Various background materials were offered to us by counsel for the respondents.

The respondents bear the evidentiary burden of proof and persuasion on both applications for political asylum

withholding of removal. *See* the Board's decisions in *Matter of Acosta* and *Matter of B-*. Respondents seeking withholding of removal must show that their life or freedom would be threatened in their country on account of one of the five enumerated grounds in the Act: race, religion, nationality, membership in a particular social group, or political opinions. Section 243(h)(1).

Respondents seeking withholding of deportation must show a clear probability of persecution. The standard is met by a showing of circumstances under which it is more probable than not that would suffer persecution. *See* Supreme Court decision in *INS v. Stevic*. Under the Refugee Act of 1980, withholding of deportation is mandatory. So once they've established eligibility for the relief and show that they are not ineligible under Section 243(h)(2) provisions, the relief must be granted and they cannot be returned to the country where they could face persecutions. *See Matter of Salim*. Under certain circumstances although, they could be returned to a third country. This mandatory aspect of Section 243(h) distinguishes it from political asylum, a discretionary grant under Section 208 of the Act.

Respondents seeking such a grant, must establish status of a refugee; the term is defined in Section 101(a)(42), as an individual with a willingness or inability to return to the country because of persecution or a well-founded fear of persecution on account of one of those five grounds: race, religion, nationality, social group, or political opinion.

This standard is met by a showing of circumstances under which a reasonable person would fear persecution. *See Matter of Mogharrabi*. And see the definition

of well-founded fear in the regulations under 8 C.F.R. 208.13, defining well-founded fear as a reasonable possibility of persecution on account of one of the five grounds.

The respondents must show that their fear is objectively reasonable, subjectively genuine. The objective component being met by what has happened to others who are similarly situated as reported in a variety of reliable sources including the aforementioned background materials that we placed into evidence in these proceedings, in accordance with the Board's decision in the *Matter of S-M-J-*.

Sometimes the only available evidence of the respondents' subjective fear is their own testimony. The Board in *Mogharrabi* said that this can suffice when such testimony is believable, consistent, and sufficiently detailed to provide us with a plausible and coherent account of the basis for that fear.

By consistency, the Board refers not only to internal consistency within the context of direct and cross-examination, but external consistency with information on the 1-589, request for asylum and any addendums; other documents in the record of proceedings, including the background material; prior sworn testimony and the sworn testimony of other respondents or witnesses in the proceedings. Credible testimony according to *Mogharrabi*, is also used in support of the objective component of the fear as well. But this reliance on testimony does not relieve the respondents' obligation to submit reliable documentary forms of evidence as the Board has warned in *Matter of Dass*, *Matter of S-M-J-*, *Matter of M-D-*, and *Matter of Y-B-*. When documen-

tary forms of evidence can be made available, they must be submitted.

Not just any fear of persecution will suffice to support the respondents' burden. The objectively, reasonable possibility of persecution on account of a grounds specified in Section 101(a)(42) of the Act, and the reasonably subjective fear of experiencing such persecution, both must be established. Once again, *See* the decision in the *Matter of Mogharrabi* and the Supreme Court decision in *INS v. Cardoza-Fonseca.*

If the respondents demonstrate a well-founded fear, they must show that they warrant the relief as a matter of discretion. They should present evidence on any positive factors warranting a discretionary grant, which include but are not limited to close family ties in the United States, which may have been the motivation for them to seek refuge here rather than in another country. *See* the Board decision in the *Matter of Pula.*

In the instant case, the respondents based their claim on religion. The male respondent claims that he was attacked on numerous occasions after Ukraine became independent from the former Soviet Union. He indicated that he was attacked and hospitalized in December 1991, that his apartment was vandalized in March of 1992, and that he was brutally attacked inside the apartment and hospitalized for one month in February of 1993. There is a medical document with regarding to that last hospitalization and there are three police reports which make reference to the attack.

Again the documents were allowed into evidence because this is an asylum relief hearing, but I intended to give them relatively little weight.

Not only do they lack any independent verification or authentication, but the police documents in particular, seem to be composed of hearsay type information. Whether the police were recording what was given to them as opposed to information gathered through independent police investigation and fact finding. Again, while this does not affect the admissibility of the document into evidence, it does affect what weight it can be given. Because it is not clear from those documents what efforts the police made, if any to verify the facts that were being given to them.

I'll note that the older reports were made after the events referred to, sometime significantly after. For instance, Exhibit 7, which is the certificate from the Ministry of Internal Affairs, is dated April 1993 but makes reference to an event that happened two months prior. For these reasons these documents were given relatively little weight.

But we did have the testimony of the respondents. As indicted, creditable testimony is used for support of both the objective and subjective components of the claim. Unfortunately, for the reasons stated below, I made a negative credibility finding in this case.

First of all, referring to the testimony of the male respondent, Vladimir, I do know that he's now 64 years of age. He's not very familiar with proceedings as conducted here in the United States. Of course that should be weighed when considering the manner of testimony. However, even taking this into consideration, I found that the testimony was generally halting and vague with regards to some significant events. There was a significant discrepancy, he stated he was attacked in Decem-

ber 1991 and hospitalized for one week. There is no mention of this anywhere. Nothing on his application for asylum or the attachment. Nothing on the addendum and there's no documents to corroborate that he was indeed hospitalized in December 1991.

He was very vague on the tenets of his religion, the principles of his religion. Very vague with regard to the source of the conflict between the Orthodox Church in Ukraine, loyal to the Kiev patriarch and that which is loyal to the Moscow patriarch. He was very vague on the attacks. The details of the attack. Who attacked him? What motivation they would have to attack him? Were they from this Russian Orthodox Church with which his denomination was in conflict with? Were they really fascists or anti-religious? None of this was ever made clear.

Also, neither the male respondent nor the female respondent made clear as to why they would be attending an Orthodox Church which appears to be loyal to the Moscow patriarch here in the United States, when this was a source of contention for them while they were living in Ukraine.

We also have some serious discrepancies with regard to the testimony of the respondent, Vera. More specifically, she indicated that the most brutal attack in February 1993 took place on the street and the respondent staggered home, and she was home at the time.

While the male respondent indicated that he was home without his wife being there and he was attacked in the apartment not outside the apartment. The respondent, Vera, insisted that these were the facts until it was brought to her attention that even the report that

she and her husband submitted, indicates that he was attacked in the apartment. Then she indicated that the attack she was referring to took place in December of 1992 and she confused the two events. But no where in the record proceedings is it indicated that there was an attack on her husband in December of 1992. There's no evidence, it's not in the addendum, it's not on the application for political asylum and respondent, Vladimir, did not testify to such an attack.

Again, for all the reasons: the internal discrepancies, the external inconsistencies with information on documents and the addendum to the I-589 request for asylum, the general vagueness of the testimony, the lack of key details and specifics with regard to the most critical portions of the claim, and the significant discrepancies between the testimony of the two respondents; for all these reasons, I find that the testimony does not rise to that level of believability and consistency in detail to provide us with a plausible and coherent account of the basis for the fear, and for that reason a negative credibility finding is made for each respondent.

This negative testimony weighed in context with the documents that I was able to give relatively little weight to, lead me to find that in the aggregate, the evidence is [*sic*] not support finding of past persecution or a well-founded fear of future persecution to the respondents based on their religious beliefs or religious affiliations.

Because they have not met the well-founded fear standard, I must also find that they have not met their burden of a clear probability required for relief under Section 243(h) of the Act. There is no evidence or testimony in the record of proceedings that would lead me to

believe that it is more likely than not that they would be tortured by the Ukrainian Government for any reason including reasons beyond the five enumerated grounds of the Act.

In lieu of deportation they have sought voluntary departure, indicating that they have never committed any crimes and would be ready, willing, and able to leave the United States pursuant to an order of voluntary departure. This relief has been granted to them as a matter of discretion.

The following order will be entered:

ORDER

IT IS ORDERED that the respondent's application under Sections 208, and 243(h), and Article 3, Convention Against Torture herein be denied.

IT IS ORDERED that the respondent's be granted voluntary departure until February 6th, 2001, or any extension that may be granted by the Board of Immigration Appeals or the Immigration and Naturalization Service.

IT IS FURTHER ORDERED that if they fail to depart when and as required, the order granting voluntary departure shall be withdrawn without further notice or proceedings: the respondents instead shall be ordered deported from the United States to Ukraine on the charges contained in the Order to Show Cause.

/s/ PHILIP MORACE
PHILIP MORACE
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before PHILIP MORACE, in the matter of:

VLADIMIR IOURI AND VERA IOURI

A 73 033 322/321

New York City, New York

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ MADELYN BARTLETT
MADELYN BARTLETT
(Madelyn Bartlett, Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

January 3, 2001
(Completion Date)